



Control Number: 28745



Item Number: 366

Addendum StartPage: 0

PUC DOCKET NO. 28607

DEC 22 9:54

IMPAIRMENT ANALYSIS OF LOCAL
CIRCUIT SWITCHING FOR THE MASS
MARKET

§
§
§

PUBLIC UTILITY COMMISSION
OF TEXAS

PUC DOCKET NO. 28744

IMPAIRMENT ANALYSIS FOR
DEDICATED TRANSPORT

§
§

PUBLIC UTILITY COMMISSION
OF TEXAS

PUC DOCKET NO. 28745

IMPAIRMENT ANALYSIS OF
ENTERPRISE MARKET LOOP
FACILITIES

§
§
§

PUBLIC UTILITY COMMISSION
OF TEXAS

SUPPLEMENTAL PRELIMINARY ORDER

These proceedings were established at the direction of the Public Utility Commission of Texas to conduct the granular analyses regarding whether competitive carriers are impaired without access to particular unbundled network elements pursuant to the Federal Communication Commission's (FCC) Triennial Review Order (TRO).¹

The Commission issued a Preliminary Order in each of these dockets on November 10, 2003. The Commission in this Supplemental Preliminary Order clarifies its jurisdiction to conduct this proceeding and details more specifically the procedures applicable.

¹ See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, *Report and Order on Remand and Further Notice of Proposed Rulemaking* (rel. Aug. 21, 2003) (TRO).

I. Jurisdiction

In Order No. 1, the Commission ALJ ruled that the Commission is acting under the federal authority granted to the FCC pursuant to section 251(d)(2) of the Federal Communications Act of 1934 that the FCC has delegated to the states to conduct analyses in accordance with federal guidelines.² The market-specific analyses performed by this Commission will allow the FCC to properly determine the degree of unbundling of network elements required under section 251(d)(2) of the Act.³ The Commission adopts the ALJ's ruling that, in conducting this proceeding, the Commission is acting under federal authority delegated to it by the FCC. In addition, the Commission has complementary authority under state law to investigate competition in the telecommunications industry, and that it may gather information in such an investigation through an evidentiary hearing.⁴ The Commission has express authority to hold an evidentiary hearing to determine the level of competition in specific telecommunications markets and may consider, among other things, the availability of telecommunications services and the existence of barriers to entry into markets,⁵ and to hold a hearing to investigate the effect and scope of competition in the telecommunications industry.⁶ The Commission also has express authority to require certificated telecommunications utilities to report information to the Commission,⁷ and to issue subpoenas to compel the attendance of witnesses or the production of information.⁸ No such powers are expressly given under the authority granted by the FCC.

² See Order No. 1 at 3 (Sept. 24, 2003).

³ See TRO ¶¶ 184, 186-190.

⁴ See PURA §§ 14.003, 14.051, 51.001, 52.001, 52.054-055, 52.101-104, 52.201-207, 60.021-22.

⁵ See *Id.* § 52.055.

⁶ See *Id.* § 52.104

⁷ See *Id.* §§ 14.003, 52.207.

⁸ See, e.g., *Id.* §§ 14.051, 52.104, 52.205.

II. Nature of Proceeding

In delegating authority to the states to make certain market and impairment determinations, the FCC specified factors that must be considered and certain parameters regarding the analyses leading to those determinations, set some deadlines, and established some procedures to challenge state action or inaction. Other than these areas, the FCC did not specify any procedures that must be followed.

In this proceeding, the Commission will investigate competition in specific telecommunications markets, which requires that the Commission gather information related to those markets. The Commission will then evaluate the information related to the competitiveness of specific markets within the framework specified by the FCC. At the conclusion of this proceeding, the Commission will make factual findings required by the FCC following the methodology specified by the FCC to implement rules adopted by the FCC. The Commission will not approve rates, approve customer contracts, detariff rates, or address whether any carrier is a dominant carrier. The detailed analysis requested by the FCC is necessary to properly determine the degree of unbundling of network elements required under federal law.⁹ Consequently, this proceeding, being investigatory in nature and undertaken to fulfill requirements under federal law, will not result a contested-case final order or rule as defined by the Texas Administrative Procedure Act.¹⁰ Not every evidentiary hearing held by the Commission is subject to the contested-case requirements of the APA. As discussed below, however, the Commission has determined that it is appropriate to use, with very limited exceptions, its procedures that are applicable to contested cases.

⁹ TRO ¶¶ 184, 186-190.

¹⁰ See TEX. GOV'T CODE ANN. § 2001.001-902 (Vernon 2000 & Supp. 2004).

This investigatory proceeding also is not an arbitration of an interconnection agreement or a resolution of a post-interconnection dispute. The Commission is not arbitrating the terms of access to an ILEC's network upon which the ILEC and a competing provider could not agree. No ILEC has indicated that it has received a request for interconnection, services, or network elements, and no parties have indicated that they entered into voluntary negotiations but were unable to resolve all issues. More importantly, no party has filed in this proceeding a petition for arbitration. Nor is any party seeking the enforcement or an interpretation of the terms and conditions of an interconnection agreement. Accordingly, although the results of this proceeding may ultimately have a bearing on interconnection agreements in some future proceeding, this proceeding is not an arbitration of an interconnection agreement or a resolution of a post-interconnection dispute.

Due to the nature of the issues involved and the timelines faced under the TRO, the Commission concludes that this investigation should be conducted through a proceeding that utilizes the Commission's procedural rules for contested cases except as discussed below. These exceptions, noted below, relate to bench requests and requiring parties to file testimony on specified issues to gather basic information regarding the degree of competition in specific telecommunications markets in Texas, and to motions for rehearing and reconsideration.

Thus, *ex parte* prohibitions shall apply, and interested parties may conduct discovery and avail themselves of the Commission's authority to compel the attendance of witnesses and the production of documents. Further, the Commission recognizes the assistance it may provide to the parties to this proceeding by requesting basic information relevant to the issues presented. The Commission will issue this request to the parties in this proceeding. Responses, however, will be limited to those geographic areas initially identified by an incumbent local exchange company for analysis. Accordingly, the Commission will direct its ALJ to issue a bench request for information to all parties and, as appropriate, other certificated telecommunications utilities.

Moreover, parties shall present factual information to the Commission by sworn evidence, and opposing parties will be allowed to challenge that evidence both by cross examination and by presenting controverting evidence. Parties to this proceeding will be required, however, to bring

forth all information in their custody and control that would inform the Commission on issues it must address in this proceeding. In section V of the Preliminary Order issued on November 11, 2003, the Commission identified specific information for which parties *must* present evidence, either through testimony or by documents supported by appropriate testimony.

In addition, the Commission tentatively decides that the parties may make oral closing arguments in lieu of post-hearing briefs. Because the Commission is hearing this matter, no proposal for decision will be prepared and exceptions and replies are not necessary.

Also, due to the nature of this proceeding, the timelines, and the opportunity for recourse to the FCC and federal courts, motions for rehearing are not required. Recourse to the FCC is provided if this Commission fails to perform under the authority delegated by the FCC.¹¹ Further the FCC will provide guidance to and exercise oversight of this Commission in exercising the authority delegated.¹² Consequently, any party dissatisfied by a decision of this Commission may seek a declaratory ruling from the FCC. Moreover, any party may seek a declaratory ruling from the FCC where necessary to remove uncertainty or eliminate a controversy.¹³ In addition, a party may file a section 208 complaint with the FCC to ensure compliance with federal law.¹⁴ As mentioned previously, the results coming out of this proceeding may find their way into Commission held arbitrations. Any party aggrieved by a determination of this Commission in such an arbitration may seek review in an appropriate federal district court.¹⁵ Given this oversight by the FCC and federal courts, and because this proceeding will not result in a contested-case final order, the Commission concludes that motions for rehearing are not appropriate. The Commission will, however, either ask for motions for reconsideration or issue preliminary findings and allow comment by the parties.

¹¹ See TRO at ¶ 190.

¹² See *Id.* ¶ 426 and ¶ 499 n.1552 (as modified by the Errata issued Sept. 17, 2003).

¹³ See *Id.*

¹⁴ See *Id.*

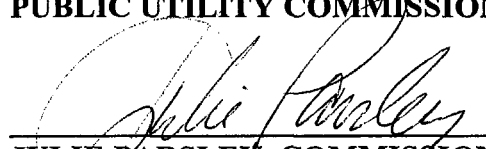
¹⁵ See 47 U.S.C. § 252(e)(6).


III. Effect of Preliminary Order

The Commission's discussion and conclusions in this Order regarding issues that are not to be addressed should be considered dispositive of those matters. Questions, if any, regarding issues that are not to be addressed may be certified to the Commission for clarification if the ALJ determines that such clarification is necessary. As to all other issues, this Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order at hearing. The ALJ, upon his or her own motion or upon the motion of any party, may deviate from the non-dispositive rulings of this Order when circumstances dictate that it is reasonable to do so. Any ruling by the ALJ that deviates from this Order may be appealed to the Commission. The Commission will not address whether this Order should be modified except upon its own motion or the appeal of an ALJ's order. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

SIGNED AT AUSTIN, TEXAS the 19th day of December 2003.

PUBLIC UTILITY COMMISSION OF TEXAS



JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, COMMISSIONER